**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

**PUBLIC COPY**

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: SEP 27 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts and as a member of the professions holding an advanced degree. The petitioner seeks employment as a graphic artist and art director for [redacted] a company owned by the petitioner and her spouse. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability in the arts, but that the petitioner failed to show that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits arguments from counsel and a copy of a magazine article. Counsel indicates that a supplement will be forthcoming within 30 days. To date, more than a year after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner does not qualify for classification as a member of the professions holding an advanced degree, but also found that "the petitioner has established that she is an alien of exceptional ability in the arts." The AAO will discuss this finding later in the decision. The director denied the petition based solely on the finding that the petitioner has not established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on October 15, 2009. In an accompanying introductory statement, counsel stated:

> [The petitioner's] unique skills have contributed to the advancement of the education of young aspiring soccer players. The advancements that [the petitioner] has contributed are significant. [The petitioner] is the illustrator for the book series '[redacted] These books are published nationally, and sold by large companies such as [redacted] company [*sic*]. . . . The series would not be as successful without the creative illustrations provided in the book.

The record (which includes copies of books in [redacted] shows that the petitioner is not "the illustrator" of those books, but rather a co-illustrator with her spouse. Counsel did not explain why the petitioner's work on children's athletic instructional books is so significant as to qualify her for the national interest waiver. It may well be that the design of the books' illustrations is integral to the overall impact of the series, but the petitioner has not established the impact of that series. The books' authors [redacted] self-published the books through [redacted] Their availability through national retailers – particularly online sellers such as [redacted] – does not imply that the books enjoy significant sales. The books are clearly intended to teach soccer skills to young children, but this does not mean that the books have had, or will have, a significant influence in this area.

Counsel stated that the petitioner's other "clients would be adversely affected if the Service were to require a labor certification under the circumstances." This vague reference to unnamed clients does not show or imply that it is in the national interest to ensure that these clients continue to employ the petitioner's services, rather than engage the services of properly qualified United States graphic artists.

The petitioner submitted copies of several materials dated 2007 and 2008, originally submitted in support of an earlier petition that the petitioner had filed on her own behalf. In a September 18, 2008 letter, [redacted] stated that the petitioner "is a hard-working person who invariably understands exactly what it takes to succeed." [redacted] clearly holds a high opinion of the petitioner's skill and character, but he did not state that the petitioner's continued work on the book series is a matter of national interest.

The petitioner submitted printouts of several World Wide Web pages discussing the [redacted] books. Counsel called these printouts "reviews," but several of them are not "reviews" at all. An article from the *Ann Arbor* (Michigan) *News* does not mention the petitioner. The article, '[redacted] teaches kids [redacted]" briefly profiled the books' authors (who reside in the [redacted] area) and discussed [redacted] motivation to write instructional soccer books for children.

Other pages, from online retailers, show product descriptions that appear to be the authors' own promotional blurbs for the books. Some retailers' pages also include "Customer Reviews." These reviews show that customers have been happy with the books, but this does not establish the extent of the books' influence. Many of the reviews do not mention the illustrations at all.

The remaining submission is a review by [redacted] *Receiving and Trapping*. A legend at the top of the page reads "Clarion – Review For Fee Service," indicating

that the book's creators commissioned and paid for the review. There is no indication in the record that the book has drawn the attention of professional book reviewers not specifically hired for the purpose. The [redacted] review begins with a mention of "[a]ppealing illustrations of a family of soccer-playing soccer balls," but afterwards does not discuss the illustrations apart from incidental references to "diagrams" and "a visible banner in the soccer field." The review does not identify the petitioner.

The petitioner submitted copies of several recommendation letters from witnesses who have worked with the petitioner in various capacities. The letters contain general praise for the petitioner's skill and dedication, but they do not distinguish her from other graphic designers to show how she qualifies for the special benefit of a national interest waiver. For example, [redacted] Ann Arbor, stated:

> I have had the pleasure of working with [the petitioner and her spouse] on the design of marketing materials for my clients. I have found them very creative, as well as personable and easy to work with.
>
> One of their projects [redacted] is a series of illustrated books for children. These books, in my opinion, exemplify the high quality work they produce. Their ability to create digital graphics is outstanding. Not only are the pages of these books full of colorful and detailed illustrations, but they also represent an imaginative and entertaining concept of how to teach children the rules of soccer.

[redacted] Lima, Peru, (which employed the petitioner from 2002 to 2005), stated that the petitioner "directed and realized" a project that "won the First Place in Design" at a 2003 competition, and that the petitioner's "comradeship and team spirit" "make her a valuable asset for any enterprise."

[redacted] at the University of Michigan, Ann Arbor, stated that the petitioner "did an excellent job designing and publishing my website. . . . The end result was beyond our expectations." These letters show that the petitioner has satisfied a number of clients in Ann Arbor since leaving Lima, but while customer satisfaction helps to establish one's competence, it does not imply eligibility for the national interest waiver.

On January 26, 2010, the director issued a request for evidence (RFE). This notice, however, did not discuss the national interest waiver. The RFE only concerned the petitioner's eligibility for the underlying immigrant classification.

The director denied the petition on May 27, 2010. The director acknowledged the petitioner's submission of "many reference letters" and evidence of "an award of limited prestige," but found that the petitioner failed to "demonstrate why labor certification would be inappropriate in this case" or to demonstrate that the petitioner "stands out in her field."

On appeal, counsel contends that USCIS relies on

> a balancing test that is overly burdensome and restrictive, and does not adhere to the 'flexibility' required by Congress. The requirement that an alien show that "the need is significantly above that necessary to prove 'prospective National benefit'" unnecessarily raises the level for the alien. This test can be equated to having an alien show that he or she is an alien of "extraordinary ability."

An alien of extraordinary ability must show sustained national or international acclaim, and rank among the small percentage at the very top of the field. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The director did not impose requirements at that level.

There is a logical basis for the requirement that the petitioner must exceed the "prospective national benefit" inherent in an alien of exceptional ability. In section 203(b)(2) of the Act, Congress acknowledged that an alien of exceptional ability in the arts, sciences, or business would prospectively benefit the United States, but also typically held such an alien to the job offer requirement. Congress could have treated the job offer as an option, or omitted it altogether, but did not do so. Clearly, exceptional ability alone is not grounds for a waiver. The waiver is an additional level of immigration benefit, and anyone claiming that additional benefit must meet an additional burden to receive it. USCIS has interpreted this additional burden to mean that an alien receiving the waiver must stand to benefit the United States even more than a typical alien of exceptional ability.

Counsel proposes an alternative standard, stating: "It is more appropriate to evaluate whether the job project that has been proposed by the alien is in the National interest. The evidence is clear to establish that the [redacted] series is a project that is in the national interest." To base the waiver entirely on "proposed" projects, rather than on an alien's past history, would open the program to abuse. It is much easier to speculate about future benefit than to demonstrate past benefit. Counsel's proposed standard offers no way to distinguish between realistic plans and implausible exaggerations, put forth solely to support a waiver application.

Furthermore, the record contains no persuasive evidence that the [redacted] project has or will result in significant benefit to the United States. The petitioner submits a copy of "[redacted] an article that appeared in the June 14, 2010 issue of *Time* magazine. Counsel states that the article shows soccer's nationwide appeal, and therefore establishes at least a potential national marketplace for the [redacted] books. Speculation that the books might one day become more popular and influential than they now are cannot take the place of objective, documentary evidence.

Also, an applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, an alien cannot subsequently become eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Conjectural assertions about the possible future impact of the book series cannot show the petitioner's eligibility as of the filing date.

Counsel contends that the petitioner's "unique skills have contributed to the advancement and the education of young aspiring soccer players. The advancements that [the petitioner] has contributed are significant." Counsel, however, fails to establish that the petitioner's work has been especially influential when compared to the work of countless other illustrators of children's educational or instructional books.

Counsel argues that the "books are published nationally, and sold by large companies such as [redacted] Company." The director did not dispute that the books are available for sale. The books' availability, however, does not force the conclusion that the books have been, or are likely to be, particularly influential, or even that customers have bought very many copies of the books. The assertion that soccer is a popular children's sport, and therefore the petitioner serves the national interest by helping to teach soccer to children, does not support the conclusion that the petitioner has had, or will have, more influence in that area than others who do similar work.

Counsel states that the petitioner cannot meet the job offer requirement, because the creators of the [redacted] series are clients rather than full-time employers, and because a job offer from another company would limit her ability to perform freelance work. These arguments address why a waiver would be in the petitioner's interest, not the national interest. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. at 223. USCIS acknowledges that self-employed aliens have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218 n.5.

As is clear from a plain reading of the statute, it was not the intent of Congress that every professional with an advanced degree or alien of exceptional ability in the arts should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In addition to affirming the director's finding that the petitioner has not established eligibility for the national interest waiver, the AAO finds that the petitioner has not satisfactorily shown that she qualifies for the underlying immigrant classification under section 203(b)(2) of the Act.

EXCEPTIONAL ABILITY

As noted above, the director found that the petitioner qualifies for classification as an alien of exceptional ability in the arts. The record, however, does not support this finding. The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) reads:

> To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

The petitioner made no attempt to satisfy three of the above regulatory standards. Instead, in an introductory statement, counsel stated:

> An alien can demonstrate exceptional ability where s/he holds an advance [*sic*] degree or its equivalent, or who because of their exceptional ability in the sciences, arts or business will substantially benefit prospectively the national economy, cultural or educational interests. Traditionally, this office has found that a Master's degree or its

> equivalent is necessary in order to establish "exceptional ability." Memo, Cronin, Action [*sic*] Associate Commissioner Office of Program and Yates, Deputy Exec. Assoc. Commissioner, Field Operations Manual. Under HR Rep. No 955 a person can show the equivalent of a Master's degree by showing a bachelor's degree plus 5 years work experience in the field of expertise. Petitioner meets this criteria, she is submitting documentation with her application that she has a bachelor's degree and that she has more than 5 years experience working as a graphic designer.

The above statement shows a fundamental misunderstanding of the relationship between the parallel classifications of "alien of exceptional ability" and "member of the professions holding an advanced degree." Counsel purports to quote a "Memo" but provides no date or title for it. In any event, there is no statute, regulation or case law to state that "a Master's degree or its equivalent" establishes exceptional ability in the sciences, arts or business. Rather, section 203(b)(2)(C) of the Act clearly states: "the possession of a degree . . . shall not by itself be considered sufficient evidence of . . . exceptional ability." Under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A), an academic degree can form part of a claim of exceptional ability, but by law that degree cannot suffice by itself.

Section 203(b)(2) of the Act established two separate classifications: (1) alien of exceptional ability in the sciences, arts or business; and (2) member of the professions holding an advanced degree. The statutory term is not simply "alien holding an advanced degree." Rather, it is "member of the professions holding an advanced degree." Clearly, it is not enough for an alien to have an advanced degree. The alien's occupation must also meet the regulatory definition of a profession. The AAO will revisit this issue later in this decision.

Counsel stated that the petitioner "holds a bachelor's degree in graphic design. Additionally, she has 5 years of expertise in her field. . . . [S]he also receives royalties from the book [redacted] She has received the [redacted] award for outstanding achievement." These claims appear to touch on four of the six regulatory standards listed at 8 C.F.R. § 204.5(k)(3)(ii).

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The petitioner submitted a copy of a certificate from the [redacted] of [redacted], Lima, Peru, indicating that the petitioner studied there from autumn 1994 to summer 1997, and "obtained the Title . . . of Technical Professional in GRAPHIC DESIGN" (emphasis in original). The petitioner therefore holds an academic degree in graphic design. (As discussion of the sufficiency of this degree belongs in a separate final merits determination, this issue will be addressed later in this decision).

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The petitioner, initially, did not claim at least ten years of full-time experience as a graphic artist. Counsel repeatedly stressed the claim of five years of experience, but the plain wording of the regulation requires "at least ten years." Even if the petitioner began creating graphic art more than ten years before the filing date, this would not prove "at least ten years of full-time experience."

The record contains portions of ETA Form 9089. Section K of that form, "Alien Work Experience," begins with the instruction to "[l]ist all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity." The petitioner and counsel (who prepared the form) left this section blank.

Subsequently, in response to the director's January 26, 2010 RFE, the petitioner submitted several letters from current and former employers. [redacted] stated that the petitioner "worked under my supervision for a period of five (5) years in my two companies, [redacted] 1999 – 2002 and [redacted] – 2005) as Manager of Art."

[redacted] of New York, New York, writing on the letterhead of [redacted] Redmond, Washington, stated that she and the petitioner "had the chance to work together at Studio A Design Consultancy for a couple of years." [redacted] did not claim to have been the petitioner's employer during that time.

[redacted] of Lima, identified as an "officer" of [redacted] stated that the petitioner "provided services to our company as a Graphic Designer for a period of 5 months in the year 2002." This letter contradicts [redacted] assertion that the petitioner worked at [redacted] "for a couple of years."

[redacted] series, stated that the petitioner "has worked as the illustrator of all six of my books."

None of the witnesses stated that the petitioner worked full-time as a graphic artist. The letters, on their face, do not establish ten years of full-time experience in the occupation.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

Counsel stated that the petitioner "was conferred the Title of Professional Technician in Graphic Design from the Ministry of Education in Lima, Peru. [redacted] [The petitioner] worked for one year in an internship under the supervision of the Ministry of Education in order to receive this separate License in Peru."

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner must support counsel's

claims with documentary evidence. The cover page for "[redacted] refers to "A license to practice the profession after taking the boards exam required by her country which gives her a Certificate from the Peruvian Nation." The two exhibits consist of translated certificates. One certificate is from the [redacted] dated April 3, 1998, indicating that the petitioner "completed satisfactorily the Career of Professional Technician / Graphic Design." The other certificate, dated September 16, 1998, stated: "The Minister of Education has conferred the title of Professional Technician in Graphic Design to [the petitioner]." The materials do not mention any one-year internship at the Ministry of Education, or any "boards exam," and the petitioner submitted no evidence from any examining authority. Nothing in the record shows that this document is comparable to occupational licensure or certification.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

The initial submission contains a translated certificate showing that the petitioner was a "First Finalist" in the 2003 [redacted] contest, held biannually by the [redacted] This prize appears to constitute qualifying recognition, thereby apparently satisfying this criterion.

The petitioner's evidence, on its face, addresses only two of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (a decision pertaining to section 203(b)(1)(A) of the Act but containing legal reasoning pertinent to the classification in the current matter before the AAO).

If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Id.* at 1115, 1119. Only aliens whose achievements have garnered "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2).

For reasons explained above, the AAO holds that the petitioner did not submit the requisite evidence. Nevertheless, in the interest of thoroughness, the AAO offers a final merits determination regarding the petitioner's degree from the [redacted] The degree certainly relates to the petitioner's claimed area of exceptional ability. Nevertheless, the petitioner has not shown that this degree demonstrates "a degree of expertise significantly above that ordinarily encountered." As the AAO will discuss in more detail below, the petitioner earned a three-year degree, and claimed that it is equivalent to a United States baccalaureate degree. The petitioner, however, did not show that a baccalaureate degree indicates "a degree of expertise significantly above that ordinarily encountered." Rather, as the AAO will show, most (but not all) United States graphic designers hold bachelor's degrees, typically earned through a four-year course of study. Therefore, a four-year bachelor's degree is "ordinarily encountered" in the occupation. The petitioner has not shown that

her three years of study represents academic training significantly above the four-year degrees ordinarily encountered among graphic designers in the United States.

By way of a final merits determination, the petitioner's evidence of claimed exceptional ability amounts to: (1) a three-year degree in a field in which most workers have a four-year degree; (2) an unspecified amount of experience; (3) a claimed license, for which counsel has described in terms unsupported by the record; and (4) an award. The AAO finds that this evidence, in the aggregate, does not meet at least three of the six standards listed in the regulation at 8 C.F.R. § 204.5(k)(3)(ii). The AAO therefore withdraws the director's finding that the petitioner has shown that she qualifies for classification as an alien of exceptional ability in the arts.

MEMBER OF THE PROFESSIONS HOLDING AN ADVANCED DEGREE

Because the petitioner has not shown that she qualifies for classification as an alien of exceptional ability in the arts, the AAO will consider the petitioner's alternative claim to qualify for classification as a member of the professions holding an advanced degree. The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner does not claim an academic degree higher than a bachelor's degree. Instead, the petitioner claims that her post-baccalaureate experience is equivalent to a master's degree. The AAO will discuss the petitioner's degree, but first, it is important to observe that the classification does not merely call for an advanced degree (or its equivalent). The statutory and regulatory language clearly requires the alien to be a member of the professions.

The regulatory definition of a "profession" is "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2).

Section 101(a)(32) of the Act reads: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The list does not include graphic artists or designers. Furthermore, the composition of the list is instructive. Congress did not choose the listed occupations arbitrarily. Each of the listed occupations involves some type of licensure or other system by which a prospective worker must demonstrate his or her credentials in order to work in

the field. An untrained or unqualified individual cannot simply set up shop as an architect or surgeon. The petitioner has not shown that the same safeguards exist for graphic artists in the United States.

Counsel has argued that the petitioner's academic degree, from Peru, is also essentially a license. Counsel cited no Peruvian statute or regulations that prohibit or restrict the employment of an unlicensed graphic artist in Peru. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

Furthermore, the petitioner seeks an immigration benefit from the United States government, in order to live and work in the United States. Therefore, it stands to reason that the petitioner must show that her occupation qualifies as a profession in the United States.

On ETA Form 9089, under "Occupation Title," the petitioner wrote '[redacted] Asked "Are the job opportunity's requirements normal for the occupation," the petitioner answered "Yes." According to O*NET (the Department of Labor's Occupational Information Network), 81% of graphic designers hold bachelor's degrees.[1] Clearly, most graphic designers hold such degrees, but not all of them. Therefore, the AAO cannot conclude that the occupation of graphic designer is a professional occupation requiring at least a bachelor's degree. The petitioner cannot change this simply by declaring that her work requires a bachelor's degree.

The AAO notes that, in its July 1, 2009 dismissal notice relating to the petitioner's earlier petition, the AAO found that the petitioner had not shown graphic arts to meet the regulatory definition of a profession. Although the same attorney participated in both petitions, the new petition does not include any acknowledgment of this issue.

Furthermore, the petitioner's own degree is questionable.

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

8 C.F.R. § 204.5(k)(2). The petitioner submitted a copy of a certificate from the [redacted], Lima, Peru, indicating that the petitioner studied there from autumn 1994 to summer 1997. USCIS will not presume a three-year course of study to be equivalent to a United States baccalaureate degree, usually requiring four years of study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977).

[1] Source: http://online.onetcenter.org/link/details/27-1024.00#Education (printout added to record September 21, 2011).

The petitioner submitted two credential evaluations. The first is from [redacted][2] [redacted] stated that the petitioner's "Education is Equivalent to US Bachelor of Fine Art Degree," but did not explain how she reached this conclusion except to state that the [redacted] requires graduation from high school."

The second, more detailed evaluation, is from [redacted] and the European-American University.[3] He stated that his evaluation "is based on informed opinion as an expert in the field of international credentials"; he cited no particular sources with specific regard to the institution where the petitioner studied, or to education in Peru. Most of the lengthy evaluation discusses the general proposition that a three-year degree can be equivalent to a four-year United States bachelor's degree.

In his evaluation concluding that the beneficiary's three-year degree following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States, [redacted] relied on *Snapnames.com, Inc. v. Chertoff,* 2006 WL 3491005 *5 (D. Or. November, 30 2006). The judge in that case, however, found that USCIS is entitled to deference in interpreting its own regulatory definition of advanced degree. *Id.* at 11.

Even if we were to accept all of [redacted] general claims (which we do not), it would not compel a finding that *every* three-year degree is equivalent to a four-year United States bachelor's degree. (Several of the quoted sources in the evaluation itself indicate that such degrees are considered "on a case-by-case basis," which by definition rules out automatic acceptance of such degrees.) In the small section of the evaluation devoted specifically to the petitioner's education, the evaluator stated that the petitioner "has completed a three year full-time program . . . that requires high school graduation . . . for entry." This establishes that the petitioner holds a postsecondary degree, but not every postsecondary degree is at least equivalent to a bachelor's degree (an associate's degree, for instance, is below a bachelor's degree).

The evaluator also asserted that the petitioner's degree "is not merely an academic award, it is a license to practice her profession . . . It is thus in every respect functionally equivalent to a bachelor's degree in graphic design." This argument rests on the presumption that graphic design is a profession requiring at least a bachelor's degree. The petitioner has submitted nothing to establish

---

[2] In her evaluation, [redacted] indicated that she has "a Masters degree from the Institute of Transpersonal Psychology and a doctorate from [redacted]" but did not indicate the field in which she obtained her doctorate. According to its website, http://www.sorbon.fr/index1.html, [redacted] awards degrees based on past experience rather than academic study. (Printout added to record September 21, 2011.) While [redacted] indicated that she is a member of the American Evaluation Association (AEA), the Association of International Educators (NAFSA) and the European Association for International Education (EAIE), the record does not show that any of these organizations require proof of expertise as a condition of membership. The payment of dues does not confer any expertise.

[3] Like [redacted] claimed a doctoral degree ("in Humanities") from the [redacted] which awards degrees on the basis of experience rather than academic study.

that a bachelor's degree is, in fact, a minimum condition for employment as a graphic designer in the United States, let alone for *de facto* self-employment. On ETA Form 9089, the petitioner identified her employer as "Graphic and Creativity" followed by her own name. The employer's address is the same as her own, and the petitioner indicated that she has an ownership interest or a familial relationship with the owner.

We reiterate here that O*NET, a source affiliated with the Bureau of Labor Statistics and considerably more official and authoritative than [redacted] indicates that a substantial percentage of United States graphic designers – nearly a fifth – do not hold bachelor's degrees. The petitioner has not shown that graphic design is a "profession" requiring at least a bachelor's degree. This is doubly so in a situation where the petitioner is essentially self-employed, and there is no known mechanism by which the lack of a bachelor's degree would prevent a self-employed graphic designer from working in the United States.

For the reasons discussed above, the AAO finds that the petitioner has not established that her occupation qualifies as a profession, or that she holds an academic degree equivalent to a United States baccalaureate degree. Therefore, the petitioner has not shown that she qualifies for classification as a member of the professions holding an advanced degree.

Without sufficient evidence to show that she is either a member of the professions holding an advanced degree or an alien of exceptional ability in the arts, the petitioner has not established eligibility for classification under section 203(b)(2) of the Act. Eligibility for that classification is a necessary precondition for consideration for the national interest waiver. The petitioner has not met that precondition and, thus, has not shown that she qualifies for consideration for the waiver.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.